
UTAH LABOR COMMISSION

BRANDON FOIL,

Petitioner,

vs.

**MAXWAY TRUCKING and
WORKERS COMPENSATION FUND,**

Respondents.

**ORDER GRANTING
RESPONDENTS' MOTION FOR REVIEW
AND MODIFYING ALJ'S DECISION**

Case No. 06-0134

Maxway Trucking and its insurance carrier, Workers Compensation Fund (referred to jointly as "Maxway" hereafter), ask the Utah Labor Commission to review Administrative Law Judge La Jeunesse's award of temporary total disability compensation to Brandon Foil under the Utah Workers' Compensation Act ("the Act"; Title 34A, Chapter 2, Utah Code Annotated).

The Labor Commission exercises jurisdiction over this motion for review pursuant to Utah Code Annotated §63-46b-12 and §34A-2-801(3).

BACKGROUND AND ISSUE PRESENTED

Mr. Foil was involved in an accident while working for Maxway on October 18, 2005, resulting in injuries to his face, left knee, left shoulder and right wrist. Maxway accepted liability under the workers' compensation system for Mr. Foil's injuries. There is no dispute among the parties as to the benefits due for the injuries to Mr. Foil's face, left knee and left shoulder. The only dispute is the duration of the temporary total disability compensation for Mr. Foil's right wrist injury.

After holding an evidentiary hearing in this matter, Judge La Jeunesse ordered Maxway to pay temporary total disability compensation for Mr. Foil's right wrist injury until March 2, 2006. Maxway challenges Judge La Jeunesse's decision on the grounds that the evidence does not support any award of temporary total disability compensation after February 11, 2006.

FINDINGS OF FACT

The Commission finds the following facts to be relevant to Mr. Foil's claim for temporary total disability compensation. The Commission also adopts Judge La Jeunesse's findings to the extent they are consistent herewith.

In early February, 2006, Dr. Burrows examined Mr. Foil and then submitted his written opinion that Mr. Foil was restricted to light-duty work as a result of his right-wrist injury. However, Maxway had placed Mr. Foil under surveillance beginning in mid-January and continuing until

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March 2, 2006. The surveillance film showed Mr. Foil using his right wrist in various activities, with the more strenuous activities occurring toward the end of the surveillance period.

After viewing the surveillance film, Dr. Burrows stated that Mr. Foil had misrepresented his condition during the earlier examination and, had Dr. Burrows known Mr. Foil's true condition, he would not have restricted Mr. Foil to light-duty work. Judge La Jeunesse concluded that Dr. Burrows' retraction of his earlier opinion was effective as of March 2, 2006, the end of the surveillance period. On that basis, Judge La Jeunesse terminated Mr. Foil's temporary total disability compensation on that date, rather than on February 11, 2006, as requested by Maxway.

DISCUSSION

Evidentiary issue. As a preliminary matter, the Commission notes that Maxway has asked that the evidentiary record be reopened to accept an additional written statement from Dr. Burrows, dated November 28, 2006. Because Dr. Burrows' statement was not submitted during the evidentiary hearing in this matter, the Commission must determine whether the statement should be accepted and considered now, as part of the Commission's review process.

Section 63-46b-8 of the Utah Administrative Procedures Act ("UAPA") requires that ALJs conduct evidentiary hearings "to obtain full disclosure of relevant facts and to afford all the parties reasonable opportunity to present their positions." Section 63-46b-10(1)(a) of UAPA requires that an ALJ's decision must include "a statement of . . . findings of fact based exclusively on the evidence of record." Furthermore, § 34A-1-303 of the Utah Labor Commission Act allows review of an ALJ's decision based on "the evidence **previously** submitted in the case." (Emphasis added.) These provisions, taken together, establish a clear requirement that parties submit their evidence during the evidentiary hearing. This requirement is necessary both as a matter of fairness to opposing parties and for the efficient conduct of the adjudicative system.

Although Maxway asks that the evidentiary record in this case be reopened in order to admit Dr. Burrows' statement, Maxway has given no reason why Dr. Burrows' statement could not have been obtained prior to the evidentiary hearing and placed into evidence at that hearing. To the contrary, it appears Maxway had at least three months after learning of Dr. Burrows' changed opinion in which to obtain Dr. Burrows' statement and then submit the statement into evidence at the hearing. In light of Maxway's unexplained failure to obtain the statement before the evidentiary hearing, the Commission declines to admit the statement into evidence now. Consequently, the Commission will base its decision on the evidence actually presented at the hearing before Judge La Jeunesse.

Mr. Foil's claim for disability compensation for right wrist injury. Maxway has paid temporary total disability compensation to Mr. Foil through February 11, 2005, but has refused to pay compensation thereafter on the grounds Mr. Foil was not disabled after that date.

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Section 34A-2-410 of the Utah Workers' Compensation Act provides temporary total disability compensation to workers who cannot work because of industrial injuries. It is the worker's burden to prove that he or she is unable to work. In this case, Mr. Foil's claim that his right wrist injury prevented him from working after February 11, 2005, rests entirely on Dr. Burrows' initial opinion. However, whatever persuasive force Dr. Burrows' initial opinion may have had is eliminated by Dr. Burrows' later statement of April 2, 2005, that his initial opinion was incorrect because it was based on Mr. Foil's misrepresentations of his physical capabilities.

Under these circumstances, the Commission gives no weight to Dr. Burrows' initial opinion that Mr. Foil's right wrist injury prevented him from returning to his regular work duties. In the absence of any other evidence supporting Mr. Foil's claim for temporary disability compensation after February 11, 2005, the Commission concludes that Mr. Foil is not entitled to temporary total disability compensation after that date.

ORDER

The Commission grants Maxway's motion for review and concludes that Mr. Foil is not entitled to temporary total disability compensation for his right wrist injury after February 11, 2005. Judge La Jeunesse's order is hereby amended accordingly. It is so ordered.

Dated this 8th day of February, 2007.

Sherrie Hayashi
Utah Labor Commissioner